

1 listed in the warrant and application. [Dkt. 760-2, Exhibit C.]¹ Mr. Azano
 2 has previously litigated whether the search warrant for his home was
 3 supported by an affidavit that established probable cause and was free of
 4 material misstatements. He now moves to suppress the firearm and all
 5 related materials, which were not listed in the warrant and were in
 6 personal clothing closet, nowhere near any place where items that could be
 7 found that were listed in the warrant.²

11 II.

12 PROCEDURAL POSTURE

13 Mr. Azano previously moved to suppress the fruits of the search of
 14 his residence at 1 Buccaneer Way in Coronado, California by arguing that
 15 the affidavit in support of that motion failed to establish probable cause
 16 and were supported by material misstatements. *See*, dkt. 190. This Court
 17 denied that motion, finding that the warrant affidavit established probable
 18 cause and that Mr. Azano had not made the requisite showing for a *Franks*
 19 hearing. *See*, dkt. 202 and 204.

20 Mr. Azano now raises the issue of whether the seizure of the firearm
 21 and related materials violated the Fourth Amendment because the
 22 application and warrant did not mention firearms, the warrant does not
 23 allow the seizure of firearms, the firearm was in a home with numerous

26 ¹ Mr. Azano incorporates by reference the Exhibits attached to his Motion to Suppress
 27 Statements (docket entry 760-2) filed on July 17, 2017.

28 ² Mr. Azano still asserts that the search of his home was made without probable cause
 and because of material misstatements in the warrant. This Court has not previously
 ruled on the specific issues raised in this motion.

1 U.S. citizens who could lawfully possess a firearm, and the firearm was not
2 in plain view.

3 **III.**

4 **FACTS**

5 The government obtained a warrant to search Mr. Azano's residence
6 at 1 Buccaneer Way for evidence of tax crimes. The application in support
7 of that warrant was filed with this Court under seal in connection with
8 docket entry 190 and the warrant was filed in docket entry 760-2 as Exhibit
9 C. Neither the application nor the warrant ever mentions firearms.

10 **IV.**

11 **THE SEIZURE OF THE FIREARM AND RELATED** 12 **MATERIAL WAS BEYOND THE SCOPE OF THE** 13 **WARRANT**

14 The right of the people to be secure in their persons, houses,
15 papers, and effects, against unreasonable searches and
16 seizures, shall not be violated, and no Warrants shall issue, but
17 upon probable cause, supported by Oath or affirmation, and
18 particularly describing the place to be searched, and the
19 persons or things to be seized.

20 U.S. Const. amend. IV. Justice Jackson explained in *Johnson v. United*
21 *States*, 333 U.S. 10 (1948).

22 The point of the Fourth Amendment, which often is not
23 grasped by zealous officers, is not that it denies law
24 enforcement the support of the usual inferences which
25 reasonable men draw from evidence. Its protection consists in
26 requiring that those inferences be drawn by a neutral and
27 detached magistrate instead of being judged by the officer
28 engaged in the often competitive enterprise of ferreting out
crime. Any assumption that evidence sufficient to support a
magistrate's disinterested determination to issue a search
warrant will justify the officers in making a search without a
warrant would reduce the Amendment to a nullity and leave
the people's homes secure only in the discretion of police
officers. . . . When the right of privacy must reasonably yield to

1 the right of search is, as a rule, to be decided by a judicial
 2 officer, not by a policeman or government enforcement agent.

3 *Id.* at 13-14. The zenith of Fourth Amendment protections shields the
 4 home. “In the home, our cases show, all details are intimate details,
 5 because the entire area is held safe from prying government eyes.” *Kyllo v.*
 6 *United States*, 533 U.S. 27, 37 (2001); *see also Payton v. New York*, 445
 7 U.S. 573, 590 (1980) (the Fourth Amendment draws “a firm line at the
 8 entrance to the house”); *Florida v. Jardines*, 133 S.Ct. 1409, 1414 (2013)
 9 (“But when it comes to the Fourth Amendment, the home is first among
 10 equals.”).

11 **1. Absence of particularity demands suppression of the**
 12 **firearm**

13 Warrants must describe with particularity the evidence sought in
 14 connection with the suspected crime under investigation, and only then
 15 may the officers lawfully seize the evidence. “It is well settled that, when
 16 properly invoked, the Fifth Amendment protects every person from
 17 incrimination by the use of evidence obtained through search or seizure
 18 made in violation of his rights under the Fourth Amendment.” *Agnello v.*
 19 *United States*, 269 U.S. 20, 33-34 (1925) (*citations omitted*). The
 20 constitutional prohibition of general warrants “makes general searches . . .
 21 impossible and prevents the seizure of one thing under a warrant
 22 describing another. As to what is to be taken, ***nothing is left to the***
 23 ***discretion of the officer executing the warrant.*”** *Stanford v.*
 24 *Texas*, 379 U.S. 476, 485 (1965) (emphasis added), *quoting Marron v.*
 25 *United States*, 275 U.S. 192, 196 (1927); *see also Andresen v. Md.*, 427 U.S.
 26 463, 480 (1976). The Fourth Amendment demands that police executing a
 27 warrant act in accordance with the objectives outlined in the warrant. *See*
 28 *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *see also Maryland v.*

1 *Garrison*, 480 U.S. 79, 87 (1987) (“The purposes justifying a police search
2 strictly limit the permissible extent of the search.”).

3 The search warrant for Mr. Azano’s residence never authorized the
4 seizure of a firearm for a search concerning tax crimes. The agents failed
5 to apply to a neutral and detached magistrate for a “piggyback warrant”
6 after rummaging through a locked cabinet in the master bedroom closet to
7 retrieve the firearm.³ It is not clear that the neutral and detached
8 magistrate had any basis to believe that the agents intended search the
9 closet of the master bedroom—*undoubtedly one of the most intimate,*
10 *private, and constitutionally protected areas of home*—for evidence of
11 alleged tax crimes. Because the warrant completely failed to describe a
12 firearm in any manner whatsoever, the firearm and related evidence
13 should be suppressed.

14
15 **2. Seizure of the firearm was beyond the scope of the search**
16 **warrant issued to search and seize evidence, fruits, and**
17 **instrumentalities of a Conspiracy to Defraud the IRS (18**
U.S.C. § 371)

18 In *United States v. Cardwell*, 797 F.2d 1461 (9th Cir. 1986), the
19 Ninth Circuit addressed the claim that the government failed to describe
20 with particularity the records sought in a tax fraud investigation. The
21 warrant directed seizure of:

22 corporate books and records, including but not limited to
23 cancelled and duplicate checks, check stubs, journals, ledgers,
24 weekly summaries, driver trip envelopes, and daily schedules,
of the following (sic) corporations: Midwest Growers

25
26 ³ See, e.g., *United States v. Davis*, 2013 U.S. Dist. LEXIS 71696, *6-7 (D. Nev. Apr. 23,
27 2013) (“The first was a telephonic search warrant for evidence of the robbery. While
28 executing the search warrant for the robbery, the officers discovered evidence used to
prosecute Davis in this case and obtained a “**piggyback warrant**” which authorized
the seizure of the firearms, ammunition, drugs and drug paraphernalia.”) (emphasis
added).

1 Cooperative Corporation, Coast Express Inc., West Coast
2 Systems Inc., and Interstate Carriers Corporation(,) which are
3 the fruits and instrumentalities, of violations of 26 U.S.C. §
7201.

4 *Id.* at 76. The court considered the fact that the IRS conducted a lengthy
5 investigation prior to securing the warrant, had already conducted a civil
6 audit, and nevertheless failed to incorporate these findings into the search
7 warrant affidavit to refine the scope of the search and seizure. *Id.* at 78.
8 The Ninth Circuit found the general warrant to be invalid for the
9 preparation of a false corporate tax return charge, and ordered complete
10 suppression of the evidence because “no portion of the warrant [was]
11 sufficiently particularized to pass constitutional muster.” *Ibid.*

12 A thorough investigation preceding the search demands greater
13 particularity in the search warrant affidavit. “The use of a generic term or
14 a general description in a warrant, however, is acceptable to the judicial
15 officer issuing the warrant only when a more specific description of the
16 things to be seized is unavailable.” *United States v. Cook*, 657 F.2d 730,
17 733 (5th Cir. 1981). Partial suppression of evidence is appropriate where
18 some items are described in the search warrant affidavit with sufficient
19 particularity. In *Cook*, the court suppressed all evidence seized (1,305 of
20 1,317 items) except the twelve illegally “pirated motion pictures” that were
21 sufficiently described in the affidavit accompanying the warrant. *Id.* at
22 732, 735-736.

23 The FBI sent Special Agent Gerald Cook and other members of the
24 Public Corruption Squad to participate in the sixteen person search team
25 of 1 Buccaneer Way. [Dkt. 760-2, Exhibit B, pg. 127.] However, the search
26 warrant application made absolutely no mention of firearms, suspected
27 illegal campaign contributions by a foreign national, falsification of
28 campaign records, or bribery; however, the application curiously sought

1 immigration records, travel records, passports, visas, and correspondence
 2 with the U.S. Department of State. [Dkt. 760-2, Exhibit C, pg. 2007.] Of
 3 course the warrant materials never explained how a firearm could evidence
 4 fraud against the IRS. More importantly, the warrant never authorized the
 5 seizure of a firearm for any purpose. The agents' decision to seize the
 6 firearm and related evidence without judicial authorization demands
 7 suppression of this evidence.

8 **3. Inapplicability of the “plain view” exception to the**
 9 **warrant requirement**

10 The Supreme Court explained in *Horton v. California*, 496 U.S. 128
 11 (1990) that, “[a]n example of the applicability of the ‘plain view’ doctrine is
 12 the situation in which the police have a warrant to search a given area for
 13 specified objects, and in the course of the search come across some other
 14 article of incriminating character.” *Id.* at 135, citing *Go-Bart Importing*
 15 *Co. v. United States*, 282 U.S. 344, 358; *United States v. Lefkowitz*, 285
 16 U.S. 452, 465; *Steele v. United States*, 267 U.S. 498; *Stanley v. Georgia*,
 17 394 U.S. 557, 571 (Stewart, J., concurring in result). The Supreme Court
 18 determined that an “inadvertence” is not required for the government to
 19 invoke the “plain view” exception to the warrant requirement, as had been
 20 suggested by Justice Stewart in *Coolidge v. New Hampshire*, 403 U.S. 107
 21 (1970). *Id.* at 140. However, the Court simplified the Fourth Amendment
 22 requirement:

23 *if the scope of the search exceeds that permitted by the terms*
 24 *of a validly issued warrant or the character of the relevant*
 25 *exception from the warrant requirement, the subsequent*
 26 *seizure is unconstitutional without more. Thus, in the case of*
 27 *a search incident to a lawful arrest, “if the police stray outside*
 28 *the scope of an authorized Chimel search they are already in*
violation of the Fourth Amendment, and evidence so seized
will be excluded.”

1 *Ibid.*, (emphasis added). The majority explained that, “JUSTICE WHITE's
 2 dissenting opinion in *Coolidge* is instructive: ‘Police with a warrant for a
 3 rifle may search only places where rifles might be and must terminate the
 4 search once the rifle is found.’” *Id.* at 141. Conversely, a search for tax and
 5 business records should occur only in places where tax and business
 6 records are found and must terminate when those records are seized.

7 In *Horton*, police applied for a search warrant based on a suspected
 8 armed robbery of a coin dealer describing with particularity both the
 9 firearms and proceeds of the robbery in the search warrant affidavit. *Id.* at
 10 130-131. The warrant, however, only listed the proceeds of the robbery and
 11 made no mention of the firearms. *Id.* at 131. The officer searched the
 12 residence and located in plain view the firearms, stun guns, a handcuff key,
 13 and a brochure for the Coin Club, but not the proceeds of the robbery. *Id.*
 14 at 131. The Supreme Court explained that, “the scope of the search was not
 15 enlarged in the slightest by the omission of any reference to the weapons in
 16 the warrant. . . . He had probable cause, not only to obtain a warrant to
 17 search for the stolen property, but also to believe that the weapons and
 18 handguns had been used in the crime he was investigating.” *Id.* at 141.

19 By contrast, the Search Warrant in this case authorized government
 20 agents to search for and seize evidence of a conspiracy to defraud the
 21 Internal Revenue Service, including corporate, tax, and financial records,
 22 as well as immigration documents, specific communications and electronic
 23 media, and documents evidencing dominion and control for Mr. Azano
 24 and his businesses. [Dkt. 760-2, Exhibit C, EM_PLDGS_00002004—
 25 00002014.] As detailed in a separate *Motion to Suppress Statement*
 26 (docket entry number 760) filed by Mr. Azano, the unwarned statement
 27 concerning the firearm was unlawfully obtained in violation of *Miranda v.*
 28 *Arizona*, 384 U.S. 436 (1966) and should be suppressed. Moreover, none

1 of the sixteen federal agents applied for a “piggyback warrant” authorizing
2 the seizure of the firearm once it was removed from a locked cabinet in the
3 closet of the master bedroom.

4 This is not a case similar to *Coolidge* or *Horton* where the officers
5 seized evidence that clearly could have been involved in the respective
6 investigations that were the subject of the search warrants. *Coolidge*
7 involved firearms, clothing, vehicles, and even gunpowder vacuumed from
8 the car’s interior as part of a murder investigation. 403 U.S. at 447-448.
9 *Horton* involved weapons used in the robbery of a coin dealer, as well as
10 proceeds of that robbery. 496 U.S. at 130-131.

11 By contrast, the search warrant for Mr. Azano’s residence generally
12 described tax crimes and never mentioned firearms. Moreover, the agents
13 directed Mr. Azano to take them to the location of the firearm, and his wife
14 had to retrieve the key to unlock the cabinet. This could not be described
15 as a “protective sweep” because both occupants of the house were brought
16 from the lower level to the upstairs master bedroom where the firearm was
17 stored, and were tasked with assisting the agents with locating the firearm
18 and unlocking the cabinet in the closet. It strains credibility to suggest that
19 evidence of tax crimes would be found in a locked cabinet of a master
20 bedroom inside a gray handgun case. [Dkt. 760-2, Exhibit A, pg. 140.] In
21 sum, the firearm and related items were not in “plain view,” and this
22 exception to the warrant requirement cannot be invoked to justify this
23 illegal search.

24 **4. Suppression of the firearm and all related materials**

25 The Fifth Circuit explained three purposes for suppressing evidence
26 illegally obtained during the execution of a general search warrant in *Cook*.

27
28 First, it erects a deterrent to illegal searches. Second, the court
prohibits the Government from benefiting from its own wrong

1 by using the illegally seized evidence to convict. Third, by
 2 removing illegally obtained evidence from the courtroom, the
 3 court precludes itself from serving as an accomplice in the
 violation of the Constitution.

4 *Id.* at 734.

5 Here, there the search warrant materials authorizing the search of
 6 the residence at 1 Buccaneer Way for evidence of tax crimes never once
 7 referenced a firearm or related material. The application never suggested
 8 that Mr. Azano was believed to have somehow committed a tax crime with
 9 the firearm in question. The government failed to obtain a “piggyback
 10 warrant” after discovering the firearm in a locked cabinet in the master
 11 bedroom. Instead, sixteen federal agents opted to seize the firearm and
 12 related materials without any sort of judicial authorization whatsoever. As
 13 noted nearly a century ago in *Marron, supra*, “[a]s to what is to be taken,
 14 ***nothing is left to the discretion of the officer executing the***
 15 ***warrant.***” 275 U.S. at 196 (emphasis added). Suppression of the firearm
 16 and related materials is the appropriate remedy under the circumstances.

17 V.

18 REQUEST FOR A HEARING TO ADDRESS ISSUES 19 CONCERNING THE SEIZURE OF THE FIREARM AND 20 RELATED MATERIALS

21 The government violated the Fourth Amendment by seizing evidence
 22 far beyond the scope of the tax crimes under investigation, and not
 23 explicitly authorized by a neutral and detached magistrate. An evidentiary
 24 hearing is necessary—particularly without any reports written
 25 contemporaneously by FBI Agents Gerald Cook and Omar Meisel—to
 26 determine how the agents got to the firearm and related materials, the
 27 condition and circumstances that they found these materials, and to
 28 determine if the firearm and related materials were in “plain view.” These

1 factual determinations are essential to evaluate whether the government
2 complied with the strict requirements of the Fourth Amendment and the
3 search warrant authorized by the neutral and detached magistrate.

4 **VI.**
5 **CONCLUSION**

6 For the foregoing reasons, this Court should grant the above motion.

7 Dated: July 17, 2017

Respectfully submitted,

8 /s/ *Knut S. Johnson*

9 Knut S. Johnson

for Jose Susumo Azano Matsura